UNITED
NATIONS

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Security Council

Distr.
GENERAL

S/25594
14 April 1993

ORIGINAL: ENGLISH

LETTER DATED 13 APRIL 1993 FROM THE PERMANENT REPRESENTATIVE OF CANADA TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL

I enclose comments prepared by the Government of Canada with respect to United Nations Security Council resolution 808 (1993) and the creation of an ad hoc tribunal to try charges of war crimes in the former Yugoslavia.

I should be grateful if you would have this letter and the enclosed comments circulated as a document of the Security Council.

(Signed) Louise FRÉCHETTE
Ambassador
Permanent Representative

Annex

Canadian comments with respect to United Nations Security Council resolution 808 (1993) and the creation of an ad hoc tribunal to try charges of war crimes in the former Yugoslavia

1. Canada supports the recent decision of the United Nations Security Council to establish an international criminal tribunal to prosecute individuals responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. We believe that there is authority, under Chapter VII of the Charter of the United Nations, for the Security Council to adopt a resolution to create an ad hoc tribunal designed specifically to restore and maintain peace and security in the former Yugoslavia.

Concurrent jurisdiction

2. Canada believes that the jurisdiction of the tribunal should be concurrent with that of national courts. Given that there may, in some circumstances, be concern that national courts might not comply with international standards, where the ad hoc tribunal chooses to exercise its jurisdiction in a particular case it should have preferential jurisdiction over national courts.

3. Canada takes the position that no one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted, as set out in article 14 of the International Covenant on Civil and Political Rights, except where the matter was not diligently prosecuted in the national courts or international standards for the protection of human rights were not met.

Structure of the tribunal

4. While Canada supports the view that the Security Council define the structure of the tribunal and the extent of its jurisdiction by resolution, for practical reasons we believe that the tribunal should be given authority to establish detailed rules of procedure and admissibility of evidence on a priority basis once the tribunal is created and before prosecutions begin.

5. With respect to the appointment of officials to the ad hoc tribunal, Canada favours a system similar to that provided for in the Conference on Security and Cooperation in Europe (CSCE) draft proposal. Each State Member of the United Nations should be encouraged to nominate judges, prosecutors or other court officials with appropriate backgrounds and criminal law experience. The Secretary-General or the Security Council could then draw on the list of nominees to make appointments as required.

6. The continued contribution of the United Nations Commission of Experts to investigate war crimes in the former Yugoslavia, created by Security Council resolution, and the Commission's role in ongoing investigations, should also be ensured by specific reference in the Security Council resolution establishing the ad hoc tribunal.

Jurisdiction

7. With respect to the subject-matter jurisdiction of the ad hoc tribunal, it is essential that the principle of nullem crimen sine lege, nulla poena sine lege (there should be no crime except according to predetermined fixed law; there should be no crime without penalty) be applied.

8. Canada takes the position that serious violations of both customary and conventional international humanitarian law which fall within the competence of the ad hoc tribunal should be clearly articulated by the United Nations Security Council rather than merely incorporated by reference. The conduct prohibited and the required accompanying mental state should be expressly stated.

9. Security Council resolution 808 (1993) decided to establish a tribunal for the prosecution of "persons responsible for serious violations of international humanitarian law". Canada interprets serious violations of international humanitarian law to include:

(a) Violations of the laws or customs of war, including grave breaches of the Geneva Conventions and Additional Protocol I;

(b) Crimes against humanity under customary or conventional law including such acts as wilful killing and deliberate mutilation, extrajudicial and summary execution, sexual assault, slavery, torture, illegal detention, deportation, forced labour or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, and that constitutes a contravention of customary international law or conventional international law; and

(c) Acts which violate the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment.

10. Canada suggests that no person should be tried for an offence in respect of a serious violation of international humanitarian law within the competence of the ad hoc tribunal if he or she was under the age of 12 years when the act or omission occurred. Any prosecution of young persons, over the age of 12 years when the act or omission occurred, should be conducted in accordance with the Convention on the Rights of the Child.

Law to be applied for purposes of interpretation

11. For the purposes of prosecution, offences within the subject-matter of the tribunal should be defined and interpreted in accordance with international conventions, international custom as evidence of a general practice accepted as law and the general principles of law recognized by civilized nations. Prosecutions should be conducted as violations of international law rather than national law. However, if necessary for interpretive purposes, reference may be made to appropriate national law.

Principles of liability

12. Principles of liability and forms of complicity, instigation and conspiracy to commit a crime within the jurisdiction of the tribunal must be specifically and clearly defined. Guilt by association, or the creation of offences based purely on membership in a de jure or de facto group whose primary or subordinate goal is to commit crimes coming within the jurisdiction of the tribunal is not acceptable. In the context of the jurisdiction of the ad hoc tribunal, Canada supports the position that the principles governing criminal liability which hold superiors accountable for the crimes of their subordinates and generally exclude the defence of acting pursuant to superior order should be applied.

Procedural guarantees

13. Canada places great importance upon safeguarding the defendant's procedural guarantees as provided for in article 14 of the International Covenant on Civil and Political Rights and similar provisions in other international conventions or national law. On this basis, we would oppose the possibility of taking proceedings against defendants in their absence, despite the practical difficulties that may exist with respect to transfer of the accused for trial. Canada is also against creating "rebuttable presumptions" or "reverse onus" crimes on the basis that this infringes on a defendant's right to be presumed innocent until proven guilty. Although Canada does not insist that the adversarial system of procedure be adopted, we do take the position that both the prosecution and the defence should have a residual right to call and cross-examine witnesses if the court controls this process.

14. Canada takes the position that adequate procedural guarantees must be in place to protect witnesses so as to avoid exacerbating harm already suffered by the victims.

Penalties

15. Canada strongly opposes the imposition of the death penalty, notwithstanding that the offence committed may be of a particularly heinous nature.

Appeals

16. Procedures for appeal, review and revision must be established for the ad hoc tribunal despite any practical difficulties that these proceedings may present.